

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1229

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PJS

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

VINCENT W. ALBANO,

Defendant-Appellant.

*On Appeal from a Judgment of Conviction
in the United States District Court
Eastern District of New York*

Appellant's Brief

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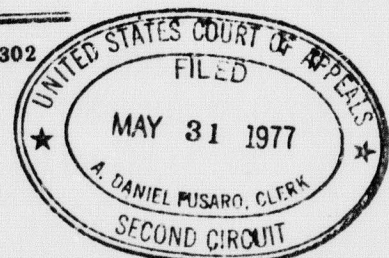


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QUESTION PRESENTED

Whether the defendant should be resentenced before a different judge because of the use of unfounded allegations of corruption as the basis of the sentence:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent,

-against-

VINCENT W. ALBANO,

Defendant- Appellant.
-----x

PRELIMINARY STATEMENT

This appeal concerns a judgment of sentence on March 31, 1977 in the Eastern District of New York (Platt, J.) after defendant's plea of guilty to counts 5, 8 and 10 of the indictment. Defendant was convicted as charged on the offenses of violating Title 26, U.S.C. Sections 7201 and 7206(1) in that on or about April 15, 1973, April 15, 1974 and April 15, 1975, the defendant who during these calendar years was married did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for these calendar years by preparing and causing to be prepared by signing and causing to be signed and by mailing and causing to be mailed, false and fraudulent income tax returns on behalf of himself and his wife which was filed with the Internal Revenue Service and was made under the penalties of perjury which returns were true and correct to every material matter.

To his plea on count 5 (tax evasion), the defendant was sentenced to a three year period of incarceration and fined \$10,000.00. To his plea on count 8 (filing false statements), the

defendant was placed on probation for a period of five years and fined \$5,000.00, such sentence to run consecutively to the sentence imposed in count 5. To his plea on count 10 (filing false statements) defendant was placed on probation for a period of five years and fined \$5,000.00, such sentence to run consecutively to the sentences imposed in counts 5 and 8. The remaining counts of the indictment were dismissed. On April 7, 1977, defendant filed a notice of appeal.

STATEMENT OF FACTS

On September 20, 1976, an indictment was unsealed which charged the defendant with five counts of tax evasion for the years 1970 through 1974 and five counts of filing false statements for the years 1970 through 1974. On October 15, 1976, the defendant pleaded guilty to counts 5, 8 and 10 and specifically indicated to the Court at that time that although he pleaded guilty, he did not concede the amounts of money alleged by the Government to have been expended by him during those years. The plea was accepted by the Court with this proviso.

After a pre-sentence report was ordered and filed, the defendant moved to contravene the report. In that motion, he challenged the Government's speculation as to the sources of cash investments made, rumor and hearsay regarding alleged prior illegalities while he was a member of the police department, lack of candor with the probation officer in preparation of the pre-sentence report and incorrect information regarding his record and separation from the police department. (1a-23a)

On January 31, 1977, the Court framed the issue:

"THE COURT: Who wishes to present evidence first; it's your motion, I suppose you do.

MR. SANTANGELO: I don't particularly feel, your Honor, that it's my burden to present evidence. There are denials on the record with regard to the serious allegations of the probation report and I believe it's the Government's burden with regard to serious allegations, which I outlined in the application to present some evidence.

THE COURT: Fine. What is the Government's view?

MR. PUCCIO: Your Honor, I would just like to say that I don't believe it's Mr. Santangelo's fault at all, but I didn't receive the papers until late Friday, probably because my office has been relocated, but I did go through the papers and I've gone through the probation report and I don't agree with Mr. Santangelo's assertions, and of course in order to go into everything that he alleges incorrect it would take quite a bit of time. I'll be willing to do it, of course, your Honor.

THE COURT: As I understand it, the basic contention of the probation report is that this is not an ordinary tax evasion case. The defendant got his money when he was a police officer, and the gist of the probation report as I understand it is, he got his money as a corrupt police officer.

MR. PUCCIO: Could I elaborate, Judge. I think your Honor has hit on the key point and I might make a statement on that to help clarify things.

THE COURT: Either that's the concept or it is not?

MR. PUCCIO: It is, your Honor.

THE COURT: He denies it and you'll have to submit proof on it because it makes a substantial difference in how he's treated. If he is an ordinary businessman who fell into the coils of the tax law by skating a little close to the edge, it's a very serious offense, but it will be treated one way if he is a corrupt cop who got his money through corruption; obviously it's going to have an affect on the sentence. (26a-27a)

The Government called Anthony Valenti, a Special Agent of the Internal Revenue Service who testified that his investigation resulted in additional taxable income of approximately \$194,000.00 for the four year period 1970 through 1974. The Court was made aware that during the period 1970 through 1974, the defendant was not a police officer and the Government presented its theory:

"MR. PUCCIO: Your Honor, our theory is not that he was necessarily earning money as a policeman in 1974, the reason Mr. Albano was investigated was because while he was a member of the Police Department there was allegations of his dealing in narcotics.

THE COURT: Right.

MR. PUCCIO: He did leave the Police Department. The fact of the matter is in a four year period, \$194,000 which has yet to be explained.

THE COURT: But the theory of the Government's prosecution is that he earned the money between '70 and '74, when he couldn't have earned it as a policeman dealing in narcotics, it seems to me that there is an inconsistency in your view. If he took in a quarter of a million dollars or so, was it as a member of the SIU?

MR. PUCCIO: No, the Narcotics Division.

THE COURT: Just an ordinary narcotics policeman?

MR. PUCCIO: Your Honor, I don't think he was an ordinary --

THE COURT: I mean, he was an ordinary corrupt policeman?

MR. PUCCIO: That would be my position. Your Honor, I think it's more than an ordinary policeman when you are talking about that kind of money. It's obviously our theory that this corruption continued while he was out of the Police Department during the years in question.

THE COURT: You mean he was still taking it as a civilian?

MR. PUCCIO: My suspicions are, your Honor, based upon all of the evidence, he was dealing in narcotics during that period because of his close association with King and Interrari and others.

THE COURT: Do you have indications he was closely associated with anybody in the Police Department after '70?

MR. PUCCIO: Well, we do but we -- after '70, yes, we have indications that he was associated with Interrari.

THE COURT: Interrari was what?

MR. PUCCIO: A Lieutenant in the Narcotic Bureau.

THE COURT: Until when?

MR. PUCCIO: Until well, Narcotic Bureau, the beginning of '72 and then he retired in the middle of 1972 and he had been assigned to a different -- I'm sorry, he was in Narcotics until '68. He was in the squad command from '68 to '72, and another assignment; which -- retired in the middle of '72.

Your Honor, if I might go even a little further, we have evidence before the Grand Jury there was an association between Albano, Interrari while Interrari was under investigation. I can elaborate on that somewhat.

THE COURT: It's just that kind of a suspicion, I don't think it's enough.

MR. PUCCIO: I think if the defendant submit an affidavit trying to contradict the probation report indicating that this money was not as a result of corruption, he should at least be able to document where this money has come from. We have \$194,000 which does not come from any documents, source, along with that we also have allegations that while he was a member of the Police Department he was involved, actively engaged in the sale of narcotics.

THE COURT: What do you have to show on that?

MR. PUCCIO: We have a file from the Police Department with a statement of a witness that he purchased heroin in 1968 on three occasions from the defendant. (32a-35a)

The Court further found that on the basis of Agent Valenti's testimony with regard to the amount of expenditures by the defendant during the period 1970 through 1974:

THE COURT: Thus far I haven't heard anything. I don't see, with all due respect to Mr. Valenti, how he's going to help you. I mean, I can assume what he says is fact, but he doesn't show any corruption during the period of '70 through '74.

THE COURT: All right, I assume he had a lot of cash during that period and there's enough to find him guilty of tax violations, but there's nothing here to show corruption." (36a)

A hearing was held on February 22, 1977 and February 23, 1977 wherein the Government presented evidence through a witness named Clifton Wright that the defendant had dealt in narcotics in the years 1965 and 1966. (43a-192a) No other evidence was presented by the Government. On March 9, 1977, Judge Weinstein held:

"The Court, based on the hearings, finds that the one witness provided by the Government was not a credible witness in any respect. He was completely destroyed on cross-examination by other witnesses.

The Court finds that there is no credible evidence that has been furnished by the Government indicating that this defendant dealt in narcotics." (196a)

However, Judge Weinstein indicated that there is a permissible inference to be drawn based on the nature of the income and the position of the defendant that he may well have obtained income from corrupt sources. He did not make such a finding because counsel requested that Judge Weinstein recuse himself which Judge Weinstein did. (195a-210a)

The case was referred to the wheel and Judge Platt was assigned. Counsel objected to Judge Platt's assignment since he had been one of the Judges on the panel who had reviewed the original probation report containing the allegations of narcotics dealings by the defendant together with other allegations which were contested. Judge Platt refused to recuse himself. (211a-227a)

On March 18, 1977, the remaining issues in contention were enumerated and disposed of before Judge Platt. The Government conceded that Albano had not been dismissed by the Police Department. The Court accepted the defendant's explanation as to his failure to report certain income regarding the sale of his home as not wilful and the Court further indicated that the other issues raised by the defendant's motion to contravene the pre-sentence report were of little moment. (Id.)

After the Court explained that it was concerned with the income tax evasion charge and nothing else, counsel stated and the Court commented:

"MR. SANTANGELO: I find it most difficult to approach sentencing after a plea of guilty because Your Honor has not had benefit of a trial and seeing evidence.

THE COURT: Maybe you ought to have a trial.

MR. SANTANGELO: I do not want a trial because the man is guilty. He pleaded guilty and there is no reason to do otherwise.

THE COURT: I always feel when a defendant comes in here and picks away at the Probation Report, the best thing to do is let him withdraw the plea and I will hear all of the evidence and I will make a real sentence. The more fuss you make, the more you are going to get people to look into things. (224a)

Thereupon, the Court ordered that the Probation Department edit the previous pre-sentence report pursuant to the rulings made and further that a new panel consider the edited pre-sentence report.

On March 31, 1977, the Government submitted a letter to Judge Platt

"to raise a critical distinction between the defendant convicted of tax evasion whose violation of the law consists of not reporting legitimate income (through whatever scheme or artifice) and a case such as the one herein where the defendant, a former public official, failed to report a large fortune for which he cannot give a credible accounting." (229a)

ARGUMENT

THE DEFENDANT SHOULD BE RESENTENCED
BEFORE A DIFFERENT JUDGE BECAUSE THE
SENTENCING JUDGE DREW A CLEARLY ERRONEOUS
INFERENCE OF CORRUPTION AGAINST HIM.

Defendant was investigated, according to the Government, "because while he was a member of the Police Department there (were) allegations of his dealing in narcotics." Judge Weinstein found that the gist of the probation report was that defendant "got his money as a corrupt police officer," and the Government contended that "this corruption continued while he was out of the Police Department during the years in question." *

This contention of the Government was utterly without proof. Judge Weinstein found that Special Agent Valenti's testimony about the amount of money expended in 1970-74 "doesn't show any corruption during the period of '70 through '74" -- and "there's nothing here to show corruption." He also found that the Government's "suspicions ... he was dealing in narcotics" was unfounded. As to specific acts of corruption and/or narcotics dealing the Government's proof, through Clifton Wright, was found to be incredible, and "completely destroyed." Yet upon referral of sentencing to Judge Platt the Government asserted

*Defendant, shot six times in the chest in July of 1969, retired in July of 1970 on a disability pension from the New York City Police Department.

in its letter of March 30, 1977, that defendant's money was come upon through illegality. Judge Platt obviously accepted the Government's view. His sentence was unusually harsh for a tax evasion case since two consecutive five-year probationary terms were imposed upon a three-year term of imprisonment.

There is no proof of one fact in the record which supports the inference of corruption which was erroneously drawn. Defendant admitted his guilt to tax evasion involving substantial income during a period of time when there were clearly legal sources for this income. He was not charged with commission of the crimes during his tenure as a police officer but during a period of time when he operated and controlled two liquor stores, two laundromats and three real estate corporations. While on the one hand the Government contended that all of the income of these legitimate businesses was attributable to him, on the other hand, they inferred illegality and corruption. Moreover, faced with the inconsistency of claiming income during the years defendant was a police officer, the Government glibly charged that this corruption continued during 1970-74. The corruption was specific -- narcotic dealing during the years '70-'74. This was totally and completely proved false. The Government's case therefore rested on some other form of unspecified corruption, suspected because of the unfounded allegation of narcotic dealing in 1965-66, which was found to be incredible by Judge Weinstein.

The defendant thus faces a sentence of thirteen years of incarceration and probation because of the prosecutor's incredible suspicion and vague charge of corruption.

Although sentences within the legal limits are not normally reviewable by this Court, unfair sentencing procedures or the consideration of improper or unfounded information may result in a resentencing before a different judge. See, e.g., United States v. Schwarz, 500 F. 2d 1350 (2d Cir. 1974); United States v. Rosner, 485 F. 2d 1213 (2d Cir. 1973); United States v. Brown, 420 F. 2d 285 (2d. Cir. 1972).

"Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." United States v. Malcolm, 432 F. 2d 809, 816 (2d Cir. 1970).

The prosecutor's contentions were based upon materially false and incredible assumptions as to the fact of defendant's corruption and the harsh sentence imposed by the District Court could only have been based thereon. Even the District Court's "wide discretion in the sources and types of information used to assist him in determining an appropriate, just and enlightened sentence," Ibid., cannot support the imposition of the sentence given to defendant. Harris v. United States, 382 U.S. 132 (1965).

The harshness of the sentence supports the inference that the District Court was influenced by the presentence report the gist of which was that defendant was corrupt. Judge Platt had read it and had recommended a sentence when he sat on the panel. Moreover, the District Court's expressed view that

"I always feel when a defendant comes in here and picks away at the Probation Report, the best thing to do is let him withdraw his plea and I will hear all of

the evidence and I will make a real sentence. The more fuss you make, the more you are going to get people to look into things"

contravenes those principles of due process which permit a defendant to rebutt facts alleged in a presentence report, See Harris v. United States, 382, U.S. 162 (1965), and which preclude a sentence to be based upon "surmise, misinformation, and suspicion." United States v. Malcolm, supra at 819. For whether this sentence is based upon surmise, misinformation, suspicion or upon a negative view of the defendant prompted by his vigorous fight against the Government's smear of corruption, it cannot stand.

Judge Platt's refusal to recuse himself, under all the circumstances, did not minimize even a suspicion of partiality." See United States v. Simon, 393 F. 2d 90, 91 (2d Cir. 1968). The unusual circumstances presented here should have precluded Judge Platt's name from being in the wheel, "both for the judge's sake and the appearance of justice," see United States v. Schwarz, 500 F. 2d 1350, 1352 (2d Cir. 1974), since he had read the tainted presentence report and had made a recommendation of sentence based upon it. In a similar situation this Court en banc, discussed the factors to be considered for the assignment of a different judge for sentencing. See United States v. Robbins, - F. 2d - NO. 76-1033, (2d Cir. March 30, 1977) 2591, slip op.

"Absent proof of personal bias requiring recusation, Title 28 U.S.C. §144, the principal factors considered by us in

determining whether further proceedings should be conducted before a different judge are (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

Judge Platt had made a determination and the appearance of justice, at least to the defendant, would have been preserved by a different assignment. Moreover, the defendant had pleaded guilty so that Judge Platt was in no special position to gain "an intimate insight into the circumstances of the defendant's crime", Id., by reason of his presiding at a trial where the details of the crime would have come to light. Accordingly, not even considerations of efficiency and feasibility are present to override the preservation of the appearance of fairness.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE
JUDGMENT BELOW SHOULD BE REVERSED
AND REMANDED FOR RESENTENCING BEFORE
A DIFFERENT JUDGE.

SABTAGELLO

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 31 day of May, 1977 at No. 225 Cadman Plaza East, Brooklyn, NY

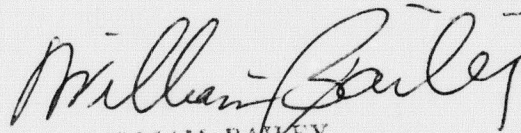
deponent served the within *Brief*
upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
31 day of May 1977.



Edward Bailey



WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

